88-129

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARRY A. COOPER, D.O.,

Petitioner

v.

BERNARD J. AMSTER, D.O., and
DELAWARE VALLEY MEDICAL CENTER, and
MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and
METROPOLITAN HOSPITAL, PARKVIEW DIVISION
Respondents — District Court for the Eastern District of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit
No. 87-1077, C.A. No. 85-6861

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Where a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) has been converted into a Motion for Summary Judgment under Rule 56 by the filing by the defendants and by the plaintiff of Exhibits, as evidentiary material, and by an Order of the District Court, where neither the District Court nor the Court of Appeals have excluded any of the Exhibits from consideration, and where it appears from the Complaint and an Exhibit of the plaintiff that the plaintiff was excluded from emergency room referral privileges at the hospital by the application of standards which were prepared and approved as the result of a combination or conspiracy having the improper purpose of excluding competition and which are not applied uniformly to all applicants for such privileges, does it sufficiently appear that the plaintiff has a cause of action under the anti-trust laws upon which relief can be granted, even though the standards formulated as a result of the conspiracy may, on their face, appear to stand for legitimate and reasonable hospital policy without an anti-competitive purpose?

2. Has the Court of Appeals, in affirming the granting of a Motion for Summary Judgment against the plaintiff on the ground that the plaintiff has not established a cause of action under the anti-trust laws, erred in failing to take note of the allegations of the Complaint and of the Exhibit showing that the standards for emergency room referral privileges were formulated with the improper purpose of excluding competition and in failing to find that the Complaint and the Exhibit established the existence of material issues of fact which precluded the entry of summary judgment?

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of this case, as set forth on the cover of the present Petition for Writ of Certiorari contains the names of all parties to the proceeding. The person on behalf of whom the present Petition for Writ of Certiorari is filed is a private individual person.

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Memorandum and Order of Ditter, J. in the District Court for the Eastern District of Pennsylvania on the motion of defendants Metropolitan Hospital, Parkview Division, Maxwell Stepanuk, Jr., D.O., and Andrew Newman, M.D. to dismiss the Complaint is officially reported at 645 F. Supp. 46 (1986) and unofficially reported in 1987-2 Trade Cas. (CCH) pg. 67, 841. The Order of Ditter, J. in the District Court for the Eastern District of Pennsylvania on the motion of defendants Bernard J. Amster, D.O. and Delaware Valley Medical Center to dismiss the Complaint has not been officially or unofficially reported.

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit filed on March 28, 1988 has not been officially reported, although reference to the decision is made officially at 845 F.2d 1010 (1988) and unofficially at 1988 U.S. App. Lexis 5246.

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

This Petition for Writ of Certiorari seeks review of the Memorandum Opinion of the United States Court of Appeals for the Third Circuit dated March 28, 1988, affirming the judgment of the District Court. This Memorandum Opinion of the United States Court of Appeals for the Third Circuit was filed and entered on March 28, 1988.

The Petition of the present petitioner for Panel Rehearing and for Rehearing En Banc was denied by Order of the United States Court of Appeals for the Third Circuit dated April 21, 1988 and entered on April 21, 1988.

Jurisdiction is conferred upon the Supreme Court of the United States to review the Memorandum Opinion

and Order of the United States Court of Appeals for the Third Circuit dated March 28, 1988 and April 21, 1988 by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. Section 1254 (1), which provides, in relevant part, that

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant statutory provisions are as follows:

Act of July 2, 1890, c. 647, Section 1, 26 Stat. 209, 15 U.S.C.A. Section 1, as amended:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years or by both said punishments, in the discretion of the court."

Act of October 15, 1914, c. 323, Section 4, 38 Stat. 731, 15 U.S.C.A. Section 15, as amended:

> "Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the

defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ."

STATEMENT OF THE CASE

The District Court had jurisdiction over this proceeding involving violation of Federal statutes against restraints on trade and monopolies under 28 U.S.C.A. Section 1337. The District Court had jurisdiction over those Counts of the action involving state common law causes of action under the doctrine of pendent jurisdiction.

The action was brought in the District Court on the basis of Federal causes of action for violations of Section 1 of the Sherman Act.

The allegations of the Complaint are that the plaintiff successfully completed a four year residency at Delaware Valley Medical Center on June 30, 1983, that in February, 1983 the Delaware Valley Medical Center published a revised set of rules, that following the completion of the plaintiff's residency on June 30, 1983 he was told by the defendants, Bernard J. Amster, D.O. and Delaware Valley Medical Center, that he did not meet the requirements of the new rules published in February of 1983, that the plaintiff in March of 1985 requested a formal meeting of the Medical Executive Committee of Delaware Valley Medical Center to consider his request for emergency room privileges, and that, on April 9, 1985, Delaware Valley Medical Center denied the plaintiff's request for such emergency room privileges (R. 10, 11). It is further alleged that Bernard J. Amster, D.O. conspired with Delaware Valley Medical Center for the purpose of furthering his personal pecuniary interests and that in so doing he was acting contrary to the interests of the Delaware Valley Medical

Center, even though he was a corporate officer and/or an employee of the Delaware Valley Medical Center (R. 13). Paragraph 17, incorporated by reference in Count I, having alleged that Delaware Valley Medical Center denied emergency room privileges for the plaintiff, paragraph 31, in Count I, alleges that defendant, Bernard J. Amster, D.O., denied plaintiff access to emergency room privileges (R. 11, 13).

Paragraph 33 alleges that the actions of Amster and Delaware Valley Medical Center constituted an undue restraint of trade and a concerted refusal to deal or group boycott as a *per se* violation of Section 1 of the Sherman Act, that these actions caused injury and damage to the plaintiff, and that these actions posed an actual and threatened burden upon interstate commerce, the effect of which was substantial and direct (R. 13).

The requirements for physicians entitled to have patients assigned or referred to them by the Orthopedic Surgery Emergency Room appear at page 332 of the Record. The four requirements are stated to be an internship and a residency approved by the AOA, certification in Orthopedic Surgery by the American Osteopathic Academy of Orthopedics, completion of at least three years service as an Active Staff physician, and admission to the orthopedic service of at least 50 patients per year (R. 322). These rules and Regulations prepared by Dr. Bernard J. Amster were approved at a regular meeting of the Board of Directors of Delaware Valley Medical Center on September 20, 1982 (R. 323, 325), slightly more than nine months before the successful completion by the plaintiff of his orthopedic residency on June 30, 1983 (R. 10).

The Motion of defendants, Bernard J. Amster, D.O. and Delaware Valley Medical Center, to Dismiss the plaintiff's Complaint alleged that the Complaint did not establish subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and that it did not state a claim upon which relief could be granted (R. 42).

Exhibits "B" through "G" inclusive, attached to the defendants' Motion, included By-laws, Rules and Regulations, minutes of the meeting of the Board of Directors of Delaware Valley Medical Center, and a letter from the plaintiff.

Attached to the Memorandum on Behalf of Plaintiff Re Order to Show Cause, and filed with the District Court, was a Statement on Behalf of Harry A. Cooper, D.O., dated October 13, 1986, for presentation to the Board of Directors of Delaware Valley Medical Center (R. 381). It appears from this Statement that Bernard J. Amster, D.O. caused the Board of Directors of Delaware Valley Medical Center to change the rules relating to emergency room assignments and privileges because he wished to avoid competition from other orthopedists who were then being produced in greater numbers at Delaware Valley Medical Center by reason of its residency program (R. 382). It further appears from the Statement that Dr. Lindenbaum, a member of the general practice staff at Delaware Valley Medical Center and Chairman of the Department of General Practice, testified that he was a member of the Board of Directors of Delaware Valley Medical Center at the time of the approval of the revision by Dr. Amster of the Rules governing assignments from the emergency room to members of the orthopedic staff (R. 382). Dr. Lindenbaum said that the stated and explicit reason for the action taken by the three department chairmen who had proposed the more restrictive rules was that they wished to protect their personal financial positions (R. 382). Dr. Lindenbaum was extremely upset by this situation and stated that his displeasure was one of the reasons for his subsequent resignation from the Board (R. 383). Finally, the Statement points out that the assignment of a Dr. Johnson to the emergency room to act for Dr. Amster indicates that there were "different standards for different people" (R. 383).

In the Answer of the defendants, Amster and Delaware Valley Medical Center, to the plaintiff's Memorandum, objections were voiced to the filing of the Statement on Behalf of Harry A. Cooper, D.O. on the ground that the document did not take the form of an affidavit, on the ground that only the Complaint should be considered in connection with a Motion to Dismiss, and on the ground that the materials revealed by the Statement were impertinent, immaterial and scandalous (R. 385 *et seque*). These objections were made following the filing by counsel for defendants of a Motion to Dismiss with attached Exhibits "A" through "H", only one of which (the affidavit of Dr. Glass [R. 329]) took the form of an affidavit or was supported by any affidavit or certification of authenticity. The District Court had, on February 5, 1986, ruled that the Motion to Dismiss of defendants, Amster and Delaware Valley, should be construed as a Motion for Summary Judgment (R. 395). The objection that documents other than the Complaint could not be considered in connection with the pending Motion is therefore inconsistent with the additional filings by the defendants which had taken place and with the ruling of the District Court. The Record does not indicate that the District Court ever granted any motion to strike the Statement on Behalf of Harry A. Cooper, D.O. or declined to consider the document in conjunction with all of the other documents which had been filed by counsel for the defendants.

Originally, the action was brought against five defendants, Bernard J. Amster, D.O., the Delaware Valley Medical Center, Maxwell Stepanuk, Jr., D.O., Andrew Newman, M.D., and Metropolitan Hospital — Parkview Division. After the filing of Motions to Dismiss by the various defendants, the District Court entered an Order severing the claims of the plaintiff against Bernard J. Amster, D.O. and the Delaware Valley Medical Center from his claims against all of the other defendants. An

Order was then entered dismissing the plaintiff's Complaint against the defendants Maxwell Stepanuk, Jr., D.O., Andrew Newman, M.D., and Metropolitan Hospital — Parkview Division. No appeal was ever taken from that Order, because the controversy among the concerned parties was resolved by an amicable agreement.

There remained only the action against Bernard J. Amster, D.O. and the Delaware Valley Medical Center.

The District Court had filed both a Memorandum and an Order dismissing the Complaint against the defendants Maxwell Stepanuk, Jr. D.O., Andrew Newman, M.D. and Metropolitan Hospital — Parkview Division. That Memorandum and Order is officially reported at 645 F. Supp. 46 (1986) and it also appears at page 404 of this Record. However, after hearing oral argument on the Motion to Dismiss filed by the defendants Bernard J. Amster, D.O. and the Delaware Valley Medical Center, which had been converted into a Motion for Summary Judgment, the District Court entered only an Order dismissing the Complaint, without leave to file an Amended Complaint, stating that the reasons for dismissal were the same as those which had been stated in the Memorandum attached to the Order dismissing the Complaint against the defendants Stepanuk, Newman, and Metropolitan Hospital — Parkview Division. That Order, dated August 7, 1986, which is not reported either officially or unofficially, appears at page 408 of this Record.

A timely Notice of Appeal to the United States Court of Appeals for the Third Circuit from the final Order of August 7, 1986 dismissing the Complaint against defendants Bernard J. Amster, D.O. and Delaware Valley Medical Center was filed, but the Court of Appeals elected to decide the case on the Briefs and on the Record, without hearing oral argument. The decision of the Court of Appeals affirming the result in the District Court was filed on March 28, 1988 and, on April 21,

1988, the Court entered its Order denying the plaintiff's petition for panel rehearing and for rehearing en banc.

ARGUMENT

The first question presented for review on this Petition for Writ of Certiorari has been occasioned by the erroneous holding of the United States Court of Appeals for the Third Circuit to the effect that the plaintiff has not established a cause of action under the anti-trust laws where it appears that the hospital has adopted objective criteria governing the eligibility of physicians for the referral list and where the plaintiff physician has not pleaded or proved anything which suggests that the criteria did not express a perfectly legitimate and reasonable policy.

This holding totally ignores the significance and effect of pleadings and evidence showing that there was an underlying improper and anti-competitive motivation for the criteria or regulations which, on their face, may appear to be an expression of legitimate and reasonable policy. If the improper and anti-competitive motivation has been pleaded and proved, the result should be a finding of violation of the anti-trust law. If the improper and anti-competitive motivation has been pleaded, then, where the defendants have not filed affidavits to establish that the pleading is false, the Courts should be precluded from entering a summary judgment against the plaintiff and from dismissing the Complaint, since a material issue of fact has been created as to the improper motivation of the criteria, standards, or regulations adopted and applied by the hospital. Prior cases in the Third Circuit and the recent decision by the Supreme Court of the United States in the case of *Patrick v. Burget*, 108 S. Ct. 1658 (1988) have all indicated that the plaintiff has made out a cause of action for violation of the anti-trust laws when he has pleaded that there has been an improper and anti-competitive motivation for

criteria, standards, regulations, or actions of hospitals which appear, on their face, to be embodiments of legitimate and reasonable policies. The decision of the United States Court of Appeals for the Third Circuit in the present case is therefore in conflict with prior cases in that Circuit and with the most recent and controlling decision by the United States Supreme Court.

It is to be noted that the Court of Appeals, in its decision, raised no question as to whether or not in the present case there was a proper showing as to the identity of the parties to the conspiracy or as to the capacity of those parties to enter into a conspiracy. We wish to show here, however, that there can be no question on those points.

The Record shows that on July 30, 1982, Dr. Amster, the Chairman of the Department of Orthopedic Surgery at the Delaware Valley Medical Center, proposed the new restrictive regulations for participation of orthopedic surgeons in emergency room privileges (R. 322). These new restrictive regulations were approved by the Board of Directors of Delaware Valley Medical Center on September 20, 1982 (R. 324). It was revealed by Dr. Amster at the time of the meeting of the Board of Directors that his purpose in proposing the new regulations was to protect his personal financial position (R. 382). In February of 1983, Rules and Regulations of the Department of Emergency Medicine were promulgated, embodying either expressly or by implication the regulations which had been approved on September 20, 1982 (R. 28). The plaintiff, having completed his orthopedic residency at Delaware Valley Medical Center on June 30, 1983 (R. 10), was informed by the defendants that he did not meet the requirements of the Rules of February, 1983 for participation in emergency room services (R. 11). In February and/or in March of 1985, the plaintiff requested from the Medical Executive Committee of Delaware Valley Medical Center the emergency room privileges which are here in issue (R. 11 and

327). On April 9, 1985, the request for privileges was denied in a letter from the Secretary of the Medical Executive Committee (R. 36). This denial is alleged by the Complaint to have been a denial by defendant Delaware Valley Medical Center (R. 11).

The plaintiff has alleged a combination or a conspiracy as between Dr. Amster and the Delaware Valley Medical Center, the entity which carried out and executed the anti-competitive action. These allegations properly identify the parties to the combination or conspiracy and also satisfy the requirement that there must be at least two or more parties to a combination or conspiracy in violation of the anti-trust laws.

Even though Dr. Amster might be deemed to be an officer or employee of Delaware Valley Medical Center, there has still been a showing that he had independent standing to conspire with the hospital. In Paragraph 32 of the Complaint, it was alleged that Dr. Amster conspired with the hospital only to further his own personal pecuniary interest (R. 13). In the Statement on Behalf of Harry A. Cooper, D.O., it appears that Dr. Amster proposed the new and restrictive regulations relating to emergency room privileges for the purpose of protecting his personal financial position (R. 382). The hospital, through its Board of Directors, then acquiesced in Dr. Amster's private purpose and gave its approval to the proposed regulations (R. 325). Where a corporate officer or employee acts for his own interest and outside the interests of the corporation, he is legally capable of conspiring with his employer for purposes of Section 1 of the Sherman Act. *Weiss v. York Hospital*, 745 F. 2d 786, 813, Note 43 (1984). In *Johnston v. Baker*, 445 F. 2d 424, 426, 427 (1971), the Third Circuit recognized that there could be a conspiracy between a corporation and an officer or employee acting "as a result of personal motives." As the Court noted in *Weiss*, this rule has been noted with approval in *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F. 2d 391, 399 (1974) and *H & B*

Equipment Co., Inc. v. International Harvester Co., 577 F. 2d 239, 244 (1978). Application of this rule was noted by the Supreme Court of the United States in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 2741, Note 15, 81 L. Ed. 2d 628 (1984) without adverse comment. It has therefore been sufficiently shown in this case that there were two separate parties to the alleged conspiracy.

We turn now to the materials which were before both the District Court and the Court of Appeals raising as an issue of material fact and/or tending to prove that the formulation and application of the criteria, standards, or regulations for the granting of emergency room referral privileges had an improper and anti-competitive motivation. In Paragraph 32 of the Complaint, it was alleged that Dr. Amster conspired with the hospital only to further his own personal pecuniary interests (R. 13). This is a sufficient allegation of improper and anti-competitive motivation. Documents placed in the record by counsel for the defendants show that Dr. Amster proposed on July 30, 1982 a new set of regulations for emergency room privileges for orthopedic surgeons (R. 322) which was approved by the Board of Directors of the hospital on September 20, 1982 (R. 324). The Statement on Behalf of Harry A. Cooper, D.O. refers to the testimony of Dr. Lindenbaum that the new regulations proposed by Dr. Amster were for the purpose of protecting his personal financial position (R. 382). The Statement is also to the effect that the new regulations have not been applied uniformly to various doctors (R. 383). The moving parties on the Motion to Dismiss which was converted into a Motion for Summary Judgment by Judge Ditter's Order of February 5, 1986 (R. 395) have not placed any evidence or sworn or certified materials in the record which would indicate that the Board of Directors or the Medical Executive Committee had any motives in accepting the proposed regulations

other than a motive to acquiesce in the purposes of Dr. Amster. The pleadings and the Exhibits filed by both sides in connection with the Motion for Summary Judgment have, at the very least, shown the existence of material issues of fact as to the motivations of Dr. Amster and of the hospital. The existence of such material issues of fact should have prohibited the entry of summary judgment against plaintiff or the entry of a judgment of dismissal.

The decision of the Court of Appeals has completely ignored the existence of these material issues of fact by ignoring the pleadings and the Exhibits. There was never any Order of either the District Court or of the Court of Appeals excluding any of the numerous Exhibits presented by both sides from consideration in connection with the Motion for Summary Judgment. Neither the District Court nor the Court of Appeals made any statement whatever as to whether or not it was or was not considering any of the Exhibits. For all that appears from the texts of the Court opinions the Motion was considered entirely without reference to any of the Exhibits which had been filed by either side, even though there were no orders or pronouncements excluding those Exhibits from consideration. This being so, both Courts should have considered the facts and issues presented by the Exhibits.

If, however, the District Court and the Court of Appeals did, in fact, exclude the Exhibits from consideration, they should have taken properly into account all of the allegations of the Complaint. They have both, to the contrary, totally ignored the allegations in the Complaint of improper and anti-competitive motivation.

In *Williams v. Kleaveland*, 534 F. Supp. 912 (1981) in the District Court for the Western District of Michigan, it was recognized that even where the good faith of standards established by the hospital must be presumed it is still a relevant issue as to whether or not the

individual doctors applying the standards acted for illegal purposes. The Court said:

> "Since the hospital is required to establish and maintain standards pursuant to statute, and since the hospital cannot act except through its personnel, good faith must be presumed. Plaintiff must bear the burden of proving that the individual doctors acted for illegal purposes to benefit their private practices rather than to maintain the legitimate standards of the hospital."

It was recognized again in *Pontius v. Childrens' Hospital*, 552 F. Supp. 1352, 1372 (1982) that a plaintiff who can prove that the hospital decision was motivated by an anti-competitive reason will still have a viable cause of action. The Court said:

> "If a hospital decides, following a hearing which meets the requirements of due process, to terminate a physician's staff privilege for reasons valid under the anti-trust laws, and those reasons are supported by substantial evidence, no factual question remains as to Section 1 claims — the "restraint" is a reasonable one. If, on the other hand, the hospital's decision is not supported by substantial evidence, or the procedure used to reach the decision is substantially defective, a question of fact will be presented as to the reasons for the privilege decision. It is important to note that a mere showing that the reasons advanced by the hospital are not supported by substantial evidence will not prove a plaintiff's case for him. *Such a plaintiff will still have to prove that the hospital's decision was motivated by an anti-competitive reason rather than a legitimate one.*" (Emphasis supplied).

In *Miller v. Indiana Hospital*, 843 F. 2d 139 (1988), the Third Circuit Court of Appeals itself reached a decision which is clearly contrary to the reasoning of the

decision in the present case. The District Court had granted the motion of the hospital for summary judgment. The Court of Appeals reversed and remanded for further proceedings, saying,

> "The hospital argues that its conduct was patently reasonable because Miller, after a full hearing approved by the State Court was found to have demonstrated professional incompetence and unprofessional conduct. However, Miller has produced evidence which, if believed by the jury, would show that, in fact, the hospital's revocation of his privileges, although ostensibly for professional incompetency and unprofessional conduct, was motivated by the anti-competitive purpose of destroying Miller's competition or prospective competition. . . . The evidence produced by Miller is sufficient to raise a genuine issue of material fact as to whether the hospital's conduct in revoking Miller's staff privileges was, as the hospital claims, because of incompetency and hence a reasonable restraint or whether it was a result of anti-competitive motivation and therefore constituted a prohibited restraint of trade. That issue is for the fact-finder which, if it decides that the restraint of trade was unreasonable, will also fix the amount of any damages".

In *Patrick v. Burget*, 108 S. Ct. 1658 (1988), the Supreme Court of the United States has rendered a decision which validates the contentions of this Petition by showing that, where the state action defense is not available, and where the actions of the hospital on their face appear to be expressions of legitimate and reasonable policy, the plaintiff will still have a valid cause of action for violation of the anti-trust laws if he can plead and prove, as did the plaintiff Patrick, that the actions of the hospital were really motivated by improper and anti-competitive underlying purposes.

Patrick, in the United States District Court, had contended that the Clinic partners had initiated and participated in the hospital peer-review proceedings to reduce competition from Patrick rather than to improve patient care. The contention was denied by the defendants, but the District Court submitted the dispute to the jury with an instruction that the jury could rule in favor of Patrick if it found that the defendants' conduct was the result of a specific intent to injure or destroy competition. The Court of Appeals for the Ninth Circuit agreed that there has been substantial evidence that the defendants had acted in bad faith in the peer-review process for the purpose of disadvantaging a competitor rather than to improve patient care. The District Court was reversed, of course, because of the conclusion of the Court of Appeals that the state action defense was applicable. When the United States Supreme Court reversed the Court of Appeals by holding that the state action defense would not be applicable, it left untouched a situation in which the plaintiff had been permitted by the District Court to recover against the defendants because he had alleged and proved that the conduct of the defendants, ostensibly and purportedly for the purpose of upholding hospital standards, was in reality the result of a specific intent to injure or destroy competition. The United States Supreme Court has therefore clearly indicated that a plaintiff has a valid cause of action for violation of the anti-trust laws where he is able to plead and/or prove that there has been an anti-competitive motivation for hospital actions which give the appearance of having been taken for legitimate and reasonable policy reasons.

These cases indicate that this Honorable Court should grant the present Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Third Circuit, which has totally ignored the plaintiff's allegations of improper and anti-

competitive motivation as well as the materials in the Exhibits which support those allegations.

The second question presented for review by this Petition for Writ of Certiorari is clearly implied by the first question. The allegations of the Complaint and the Exhibits, including specifically the Exhibit entitled Statement on Behalf of Harry A. Cooper, D.O. (R. 382), do clearly raise a material issue of fact as to whether or not the criteria and regulations were formulated and applied by the hospital to the plaintiff for underlying reasons which were improper and anti-competitive. The plaintiff maintains that since the parties on both sides had submitted voluminous Exhibits and since the Court had converted the Motion to Dismiss into a Motion for Summary Judgment, the Court should have considered all of the Exhibits in making a determination as to whether or not there were genuine and material issues of fact which should preclude the entry of summary judgment against the plaintiff. Both sides submitted Exhibits which were not in the form of affidavits. The Courts made no orders or decisions excluding the Exhibits from consideration. The Exhibits should therefore have been considered in conjunction with the pleadings.

If, however, it is thought that the Exhibits should not have been considered, because they were not in the form of affidavits, then the District Court and the Court of Appeals were still obliged to look at the pleadings and to recognize that the plaintiff had sufficiently alleged an improper and anti-competitive motivation for the formulation of the criteria and regulations which were used to deny him emergency room referral privileges. The obligation to recognize that a material issue of fact is raised by the pleadings which precludes the entry of summary judgment was ignored by the lower Courts. If the District Court and the Court of Appeals considered that they were treating the motion of the defendants as a Motion to Dismiss, they were obliged to recognize that the plaintiff's Complaint was not demurrable, simply

because it *did* sufficiently allege an improper and anti-competitive purpose for the criteria and regulations as well as a conspiracy to implement that improper and anti-competitive purpose.

It is clear that the Court of Appeals for the Third Circuit has made a decision squarely in conflict with other decisions in the same Circuit and with the decision of the Supreme Court of the United States in the case of *Patrick v. Burget*.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY A. COOPER, D.O. *Plaintiff*	:	CIVIL ACTION No. 85-6861
v.	:	
BERNARD J. AMSTER, D.O., et al. *Defendants*	:	

MEMORANDUM AND ORDER

DITTER, J. August 7, 1986

Plaintiff is a doctor. He brings this anti-trust action against two hospitals and three other doctors alleging that because the hospitals do not refer emergency patients to him, the defendants have violated section 1 of the Sherman Act and various state laws.[1] In no other way is plaintiff precluded from practicing medicine or using the hospitals' facilities. Presently before me is the motion of one of the hospitals, Metropolitan Hospital-Parkview Division, and two of its staff members, to dismiss the complaint for lack of subject matter jurisdiction under Fed. R.Civ. P. 12 (b)(1) and for failure to state a claim pursuant to Fed. R.Civ. P. 12(b)(6). The motion must be granted on both grounds.

In the first place, plaintiff's anti-trust claims must be dismissed for lack of subject matter jurisdiction because they are clearly frivolous and, in any event, lack ripeness. This action is frivolous because plaintiff is not being precluded from doing anything by any of the

1. There is no contention that there has been any agreement between the hospitals or between their respective staffs with regard to plaintiff.

defendants. He may find his own patients, accept patients from anyone who will refer them, admit patients to the hospital, treat them in the emergency room, and use any of the hospital's facilities. The sole basis of his suit is that the hospital refers patients to other doctors, but does not refer patients to him. This is in keeping with the hospital's policy that it will not refer patients to a doctor who has been on its staff for less than five years unless the doctor is associated with other qualified doctors. Plaintiff was not singled out for this treatment nor has he pointed to anything which suggests that this is not a perfectly legitimate and reasonable policy. There is nothing in the law that requires the hospital to be his bird dog just because it is the bird dog for other doctors who have been associated with it for a longer period of time. Plaintiff may wish that the hospital would refer patients to him, but the Sherman Act does not require it to do so.

Additionally, the ripeness doctrine precludes this court from exercising subject matter jurisdiction. The hospital's internal administrative procedures provide plaintiff the opportunity to present his grievance before its governing body, the board of directors. Plaintiff, however, has failed to take the necessary steps to do so. Consequently, the hospital has never considered, much less decided, the merits of his grievance. Plaintiff seeks to excuse his failure by asserting that it would be a useless gesture on his part. This conclusion is based entirely upon his own perceptions and conjecture and is wholly unsupported. The hospital's internal procedures are neither onerous nor, on their face, futile. It is little enough to ask that plaintiff get a definitive no from the hospital before he comes to court for an injunction, treble damages, and the whole panoply of Sherman Act relief.

Finally, plaintiff's anti-trust claims must also be dismissed for failure to state a claim upon which relief can be granted for the same reasons that they were

dismissed as frivolous under Fed. R.Civ. P. 12(b)(1) above. Because all of plaintiff's federal claims are dismissed, I decline to exercise pendent jurisdiction over his state claims which are also dismissed.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY A. COOPER, D.O.	:	CIVIL ACTION
	:	No. 85-6861
v.	:	
	:	
BERNARD J. AMSTER, D.O., et al.	:	

ORDER

AND NOW, this 12th day of January, 1987, after hearing the arguments of counsel, and plaintiff having failed to show cause why his action should not be dismissed against defendant's Bernard J. Amster, D.O., and Delaware Valley Medical Center, it is hereby ordered that plaintiff's action is dismissed for the same reasons it was previously dismissed against the other defendant hospital and doctors. *See Cooper v. Amster*, 645 F. Supp. 46 (E.D. Pa. 1986).

BY THE COURT:

_____

J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1077

HARRY A. COOPER, D.O.,

Appellant

v.

BERNARD J. AMSTER, D.O., CHAIRMAN — DEPARTMENT OF SURGERY, and DELAWARE VALLEY MEDICAL CENTER, and MAXWELL STEPANUK, JR., D.O., and ANDREW NEWMAN, M.D., and METROPOLITAN HOSPITAL, PARKVIEW DIVISION,

Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 85-6861)
District Judge: Honorable J. William Ditter, Jr.

Submitted under Third Circuit Rule 12(6)
March 7, 1988

Before: WEIS, GREENBERG, and ALDISERT,
Circuit Judges.
(Filed: March 28, 1988)

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge*.

Plaintiff is an orthopedic specialist on the staff of the Delaware Valley Medical Center. Defendant Bernard J. Amster, D.O. is Chairman of the Center's Division of Orthopedics.

After successfully completing a four-year residency in June, 1983, plaintiff was granted medical staff membership with concommitant clinical privileges at the hospital. Some two years later, he asked to be placed on the hospital's rotation list making him eligible for patient referrals by the emergency room.

Adopted before plaintiff joined the staff, hospital regulations required staff members to meet four requirements before being included on the rotation list:

> 1. Completion of an AOA approved internship and residency;
>
> 2. Certification in orthopedic surgery by the American Osteopathic Academy of Orthopedics;
>
> 3. Status for at least three years as an active staff physician;
>
> 4. Admission of at least fifty patients per year from the physician's practice to the hospital's orthopedic service.

The Medical Executive Committee denied the plaintiff's application, advising him that he failed to satisfy the necessary criteria.

Plaintiff has pursued administrative appeals at the hospital while seeking judicial relief. In the district court, he alleged a violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and asserted pendent state law claims. Plaintiff also raised these common law causes of action in a related case still pending in the state court.

The district court entered summary judgment for the defendants, noting that the "plaintiff is not being precluded from doing anything by any of the defendants." The court observed that he may "find his own patients, accept patients from anyone who will refer them, admit patients to the hospital, treat them in the emergency room, and use any of the hospital facilities."

Essentially, the plaintiff's sole claim is that the hospital refers emergency room patients to other doctors, but not to him.

The hospital has adopted objective criteria governing the eligibility of physicians for the referral list. Because these standards focus on the doctor's years of experience in practice, they are relevant to professional competence — obviously a matter of serious concern to the hospital which could be held liable for negligently referring a patient to an incompetent staff member. As the district court found, plaintiff was neither singled out for special treatment, "nor has he pointed to anything which suggests that [the criteria do not express] a perfectly legitimate and reasonable policy." We conclude that the hospital's policy does not violate the antitrust laws.

Having determined that plaintiff has not established a cause of action under the antitrust laws, we need not discuss the other grounds briefed by the parties. The district court properly entered summary judgment for the defendants, and therefore we will affirm.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1077

HARRY A. COOPER, D.O.,

Appellant

v.

BERNARD J. AMSTER, D.O.,
CHAIRMAN — DEPARTMENT OF SURGERY, and
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and MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and METROPOLITAN
HOSPITAL, PARKVIEW DIVISION,

Appellees

D.C. Civil No. 85-6861

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge*, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, ALDISERT
and WEIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT

Circuit Judge

Dated: April 21, 1988